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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN ROBERT HELSER, Defendant and Appellant.	C079151 (Super. Ct. No. 14F01426)

This appeal involves a child molester's sentence. The trial court originally sentenced defendant Kevin Robert Helser to an aggregate determinate term of 58 years in state prison on nine counts of lewd and lascivious acts on his niece, a child under 14 years of age (Pen. Code, § 288, subds. (a), (b)(1))[1] but increased the sentence two months later to 70 years 8 months to correct the mistaken imposition of eight years as the upper term, rather than the 10 years allowed by a statute adopted after some of the crimes defendant committed and before he committed others. Defendant raises several

[1] All further statutory references are to the Penal Code unless otherwise designated.

challenges to his sentence: 1) the trial court did not have jurisdiction to increase his sentence on the crimes committed after the statute increasing the upper term became effective, 2) imposition of the increased punishment for crimes committed before the statute was enacted violate the ex post facto clauses of the state and federal Constitutions,[2] 3) there is no substantial evidence to support the imposition of mandatory consecutive sentences on counts the trial court found occurred on separate occasions, 4) he is entitled to one additional day of credit, and 5) the amended abstract of judgment requires correction.

The Attorney General agrees defendant is entitled to an additional day of credit and asks us to correct the amended abstract of judgment. We agree with defendant the court lost jurisdiction to correct judicial error and there is no substantial evidence to support a finding the kissing and the genital touching counts occurred on separate occasions. The case is remanded to the trial court for a hearing to determine whether full-term consecutive sentencing is warranted under section 667.6, subdivision (c) and to reinstate the original sentence except as to the modifications conceded by the Attorney General.

FACTS

Few facts are pertinent to the sentencing issues before us. Three alleged victims testified, although defendant was charged with committing lewd and lascivious acts against only his niece A. A.'s sister testified defendant molested her many times when she was five years old. A.'s friend testified defendant had molested her as well when she was about six or seven years old. But the case before us involves 11 counts of sexual misconduct exclusively against A.

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[2] We need not address defendant's ex post facto claim because we conclude the sentences imposed on crimes committed both before and after 2010 were authorized. (See part I of the Discussion, *post*.)

Defendant lived sporadically with A.'s family. He began molesting A. when she was eight years old and the family lived in an apartment. Defendant babysat A. and her siblings while her mother worked. The molestations subsided for a few years but resumed again after he moved in with the family when they lived in a house on Cherokee Way. The only evidence relevant to the sentencing issues defendant raises on appeal involve the sexual assaults that occurred one day in August 2013. The record discloses the following evidence.

The amended information alleged that counts 8 and 11 occurred in August 2013 at the house on Cherokee Way. Count 8 was alleged to have occurred when defendant placed his penis on A.'s vagina for the first time, and count 11 was alleged to have occurred when he kissed her for the first time. Defendant lived in a converted garage at the house. A. testified at trial that when she went to do her laundry in the garage, defendant came up behind her, pulled her pants down, turned her around, and began kissing her on the lips. He led her to the futon, kissed her on the mouth again, and then picked her up and laid her on the futon. Defendant got on top of her, pulled off her underwear, and put his penis against her vagina for a few minutes.

The prosecutor told the jury that count 8 occurred on the same occasion as count 11. "Count Eleven says that he kissed [A] at Cherokee Way. And we say first time, because this happened on multiple occasions.

"What this is referring to, is during the acts of penis to vagina, she testified in court that he would kiss her on the face and about the face during those events."

SENTENCING

The initial probation report informed the court the sentencing triad for section 288, subdivision (b)(1) was three-six-eight years. On March 26, 2015, the trial court stated it intended to impose the upper term for most of the counts. Although the upper term for offenses committed after 2010 is 10 years, the court orally imposed consecutive sentences of eight years for counts 1, 2, 8, 9, and 10. The court also imposed a

consecutive sentence of six years for count 11 because the conduct involved kissing and not genital contact, and consecutive two-year terms (one-third the middle term) on counts 4 and 12.

The trial court stated that a full-term consecutive sentence for count 11 was mandatory under section 667.6, subdivision (d) because that offense occurred on a separate occasion from other offenses. "The Court additionally sentence[s] as follows: As to Count One, and I will note Counts One, Two, Four, Eight, Nine, Ten and Eleven are counts involving allegations and a finding by the jury of a violation of section 288, paren, B, therefore, they are being sentenced under the scheme set forth in 667.6, paren, D.

"We discussed this as being the mandatory consecutive sentence for crimes occurring on separate occasions."

The court therefore imposed an aggregate sentence of 58 years, a sentence that was accurately entered into the minutes and reflected in the abstract of judgment. The court ordered defendant remanded to the custody of the sheriff "forthwith."

Probation discovered the error and submitted an amended sentencing recommendation informing the court that for the offenses committed in 2013 the sentencing triad for section 288, subdivision (b)(1) was five-eight-ten years. At a second sentencing hearing on June 4, the court resentenced defendant to an aggregate term of 70 years 8 months, which included an additional eight-month sentence on count 4. In short, the court increased the sentence on six counts an additional two years. On appeal, defendant challenges his sentence.

DISCUSSION

I

Jurisdiction to Increase the Sentence?

Defendant contends that once the trial court pronounced his sentence and remanded him to the custody of the sheriff, it lost jurisdiction to resentence him. His

argument is consistent with the general common law rule that "a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. [Citations.] Where the trial court relinquishes custody of a defendant, it also loses jurisdiction over that defendant." (*People v. Karaman* (1992) 4 Cal.4th 335, 344.)

The Attorney General does not suggest that the error was clerical rather than judicial. It is clear that the court's sentencing choices "were the result of the exercise of judicial discretion, and that any error the court sought to remedy thus was judicial rather than clerical in nature." (*Karaman, supra,* 4 Cal.4th at pp. 345-346, fn. 11.) The Attorney General does, however, urge us to apply one of the other exceptions to the general common law rule. "Yet another exception is an unauthorized sentence. '[A]n unauthorized sentence . . . is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.' [Citation.]" (*People v. Amaya* (2015) 239 Cal.App.4th 379, 385.)

"A sentence is unauthorized when it could not lawfully be imposed under any circumstance in the particular case: '[L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement.' [Citation.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 4.) The Attorney General maintains that the trial court imposed the upper term, and as a matter of law, the upper term is 10 years for the offenses committed in 2013. As a result, the Attorney General argues, an eight-year sentence was unauthorized.

It is true the trial court intended to impose the upper term. But we agree with defendant there is a disconnect between the court's intention and the sentence it imposed. The court imposed sentences on six counts that were two years less than the upper term. The Attorney General thus conflates doctrines governing resentencing following the imposition of unauthorized sentences and resentencing following judicial error. The

eight- and six-year terms the court imposed were authorized under the statute; they simply did not constitute the upper term. Thus, it is analogous to *People v. Drake* (1981) 123 Cal.App.3d 59 (*Drake*), wherein "the trial court exercised its discretion to impose the middle term. Insofar as this resulted in an aggregate term, which, by operation of law, was different from what the court intended, the error was judicial in nature. [Citations.] This is manifestly a 'case in which the trial judge, having failed orally to refer to findings in aggravation of punishment, thereafter "corrects" the judgment with the effect of enhancing the severity of the sentence.' [Citation.] In purporting to revise its judgment by imposing the upper term of imprisonment, the trial court acted in excess of its jurisdiction under the common law." (*Id*. at pp. 63-64.)[3]

The trial court did not, as in many of the cases cited by the Attorney General, neglect to perform a mandatory duty to impose a specified sentence. In those cases, the sentence is not legally authorized and therefore is correctable on appeal. (See, e.g., *People v. Solóranzo* (2007) 153 Cal.App.4th 1026, 1041.) Here, by contrast, the court had the discretion to impose any one of the terms set forth in the triad. Although the court intended to impose the upper term, that is not what it did. And it did not have a mandatory duty to do so. Rather, it imposed one of the terms set forth in the triad, just two years shorter than the maximum it might have imposed. That is a classic example of judicial error, not an unauthorized sentence. And therefore, the exception urged by the Attorney General does not apply and the trial court lost jurisdiction to resentence defendant once it remanded him to the custody of the sheriff.

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[3] The Attorney General discounts *Drake*'s precedential value, pointing out it has been criticized and rarely followed. The case has not been criticized for the principle we find compelling—that the court acted in excess of its jurisdiction when it attempted to resentence a criminal defendant to correct judicial error.

II

Mandatory or Discretionary Consecutive Sentences?

The trial court sentenced defendant to consecutive sentences on counts 8 and 11 pursuant to section 667.6, subdivision (d), which provides: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.

"In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." Under subdivision (d) of section 667.6, therefore, consecutive sentences are mandatory if the sexually assaultive behavior occurred on separate occasions.

Section 667.6, subdivision (c) consecutive sentences, by contrast, are discretionary. Subdivision (c) states: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise

would have been released from prison." Subdivision (e) includes "[l]ewd or lascivious act, in violation of subdivision (b) of Section 288." Insisting that the mandatory consecutive sentence imposed by the trial court was improper because the sexually assaultive conduct described in the two counts did not occur on separate occasions, defendant urges us to remand the case to the trial court for a hearing to determine whether a discretionary consecutive sentence is appropriate pursuant to subdivision (c). The Attorney General agrees that remand to determine whether full-time consecutive sentencing is warranted is the appropriate remedy if count 11 was not committed on a separate occasion from count 8.

Thus, we must determine whether there is sufficient evidence of the type of pause, movement, hesitation, or any other interruption between the two counts sufficient to support the inference the "defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) It is true, as the Attorney General suggests, that very little is needed to support a separate-occasion finding. "[O]nce the trial judge resolves the issue of 'separate occasions,' an appellate court is 'not at liberty to overturn the result unless no reasonable trier of fact could decide that there was a reasonable opportunity for reflection.' " (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1314-1315 (*Pena*), quoting *People v. Corona* (1988) 206 Cal.App.3d 13, 18, fn. 2 (*Corona*).)

Our analysis is somewhat complicated by the confusion over exactly what conduct was encompassed by count 11. The amended information alleged that counts 8 and 11 occurred in August 2013 at the house on Cherokee Way. It described the conduct in count 8 as "penis to vagina in the garage" "first time" and described count 11 as "kissed victim" "first time."

In closing argument, the prosecutor told the jury that count 11 occurred on the same occasion as count 8. "Count Eleven says that he kissed [A.] at Cherokee Way. And we say first time, because this happened on multiple occasions.

"What this is referring to, is during the acts of penis to vagina, she testified in court that he would kiss her on the face and about the face during those events." At the sentencing hearing, the prosecutor argued that "kissing with force was part of the arguments relating to the intercourse that happened on Count Eight and Count Nine."

On appeal, the Attorney General distances herself from the prosecutor's arguments at trial and at sentencing and relies on A.'s testimony that when she went into the garage to do her laundry and stood by the washing machine, defendant pulled her pants down and, as he turned her around to face him, began kissing her. Defendant then pulled her by the arm from the washing machine to the futon and "started kissing [her] more." He picked her up and laid her on her back on the futon. Defendant's pants and underwear were down and he put his penis on her vagina, but she testified, "he didn't really put it inside me." In the Attorney General's view, A.'s testimony reflects that there was a break, "albeit a brief one," between defendant's act of kissing A. near the washing machine and his act of placing his penis on her vagina on the futon. The Attorney General concludes that the break between kissing and putting his penis on the victim's vagina constitutes sufficient evidence from which the trial court could conclude defendant had a reasonable opportunity for reflection. We disagree.

After canvassing the factual distinctions in a litany of cases involving mandatory consecutive sentences pursuant to section 667.6, subdivision (d) in *People v. Solis* (2012) 206 Cal.App.4th 1210 (*Solis*), we concluded as follows: "It takes no particular depth of reasoning to be able to distinguish between a situation where a perpetrator engages in a continuous course of conduct involving multiple sex offenses with no break in between and one in which the individual offenses are separated by some other activity, either of the defendant or another, that interrupts the assault and affords the perpetrator an opportunity to reflect on what he or she is doing. The activity need not involve any type of movement of the victim and need not be of any particular duration. It may be nothing more than car lights going by that cause the perpetrator to pause and reflect before

proceeding, as in [*People v.*] *King* [(2010) 183 Cal.App.4th 1281 (*King*)], or some activity not amounting to a sex offense, like pausing to listen to the victim's answering machine or punching the wall, as in [*People v.*] *Plaza* [(1995) 41 Cal.App.4th 377 (*Plaza*)]*."* (*Solis*, at p. 1220.)

The issue raised in *Solis* was not, as here, the sufficiency of the evidence to support a finding the sexual assaults were perpetrated on separate occasions, but whether section 667.6, subdivision (d) was unconstitutionally vague. (*Solis, supra*, 206 Cal.App.4th at p. 1216.) Nevertheless, the collection of cases we reviewed in *Solis* debunks any common-sense notion that separate occasions require much in either time or space to differentiate one occasion from another. For example, the police officer perpetrator in *King* sexually assaulted his victim under the ruse that he was performing a lawful search. (*King, supra*, 183 Cal.App.4th at p. 1325.) He used one hand to digitally penetrate her vagina but removed his fingers and paused to look around uneasily when he saw lights on a car that passed by. The pause and uneasy look, according to the court, was evidence he had the opportunity to reflect on what he was doing before he reinserted his fingers on the other hand. (*Ibid*.) Similarly, in *Plaza*, the defendant was on a violent sexual rampage. But the court found that the interruptions between crimes, including moving the victim from room to room between the vicious crimes and stopping to listen to her answering machine, accorded him multiple opportunities to reflect before resuming his assaultive conduct. (*Plaza, supra*, 41 Cal.App.4th at pp. 384-385.)

In those cases, as we pointed out in *Solis*, the defendant or someone else initiated something that interrupted the sexual attack, albeit briefly, but sufficiently to afford the defendant the opportunity to reflect on what he was doing. *Corona, supra*, 206 Cal.App.3d 13 and *Pena, supra*, 7 Cal.App.4th 1294, by contrast, demonstrate that not all sexual assaults, including the commission of different sexual crimes, constitute separate occasions. Where the record reflects the lack of any appreciable interval between the sexual crimes, the defendant is involved in a continuous course of conduct

and the perpetrator is not subject to mandatory consecutive sentences for committing those crimes on separate occasions.

"In *Corona*, the defendant removed the victim's pants, put his finger in her vagina, kissed her genitals and then put his penis in her vagina." (*Solis, supra*, 206 Cal.App.4th at p. 1216.) Then he got up and left for five minutes. When he returned, the victim asked why he was doing this to her and he responded that if she did not cooperate " ' "this will hurt you more." ' " (*Id*. at pp. 1216-1217.) He then resumed his sexual assault and raped her a second time. (*Corona, supra*, 206 Cal.App.3d at p. 15.) The Attorney General conceded that the oral copulation and penetration with a foreign object that preceded the first rape did not occur on a separate occasion from the rape. (*Id*. at p. 16.) We explained: "There is no evidence of any interval 'between' these sex crimes affording a reasonable opportunity for reflection; there was no cessation of sexually assaultive behavior hence defendant did not 'resume[] sexually assaultive behavior.' " (*Id*. at p. 18.)

Similarly, in *Pena*, the Court of Appeal found the evidence insufficient to support a separate-occasion finding for rape and forcible oral copulation. The evidence showed that defendant forced the victim into her house and onto a bed, where he raped her. He then "got off of her, twisted her by the legs violently, and orally copulated her." (*Pena, supra*, 7 Cal.App.4th at p. 1299.) The court concluded: "[A]ppellant did not have a 'reasonable opportunity to reflect' between his acts of rape and forcible oral copulation. As was the case in *People v. Corona*, nothing in the record before this court indicates *any* appreciable interval 'between' the rape and oral copulation. After the rape, appellant simply flipped the victim over and orally copulated her. The assault here was also continuous. Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior." (*Pena, supra*, 7 Cal.App.4th at p. 1316.)

Collectively, these cases do not create a clear line between an "appreciable interval," during which a perpetrator has the opportunity to reflect, and a continuous

course of conduct, during which he does not. Here we have two possible factual scenarios. The Attorney General posits that the kissing at the washing machine constituted the assaultive conduct underlying count 11. Defendant argues that the prosecutor made it perfectly clear to the jury that the kissing and the genital touching were part of one transaction and that kissing may have immediately preceded the touching on the futon. We need not identify which kissing episode formed the evidentiary basis for count 11 because either scenario is analogous to *Corona* and *Pena*, wherein the courts concluded there simply was not *any* appreciable interval between various sex crimes to provide the perpetrator the opportunity to reflect.

There is no evidence, as in *Plaza*, that defendant moved his victim from room to room; nor is there evidence, as in *King*, that defendant paused or was interrupted by any external factor. Indeed, there is no evidence how many steps defendant took from the washing machine to the futon. A. testified they were both in defendant's makeshift bedroom in the garage. What she did tell the jury was that defendant kissed her by the washer, moved her to the futon, continued kissing her, lay on top of her, and put his penis next to her vagina. There is therefore no evidence of any appreciable interval between the kissing at the washing machine and the genital touching that immediately followed. Thus, on this record there is insufficient evidence to support a separate-occasion finding.

Our conclusion that defendant was not subject to a mandatory consecutive sentence under section 667.6, subdivision (d) does not preclude a consecutive sentence pursuant to section 667.6, subdivision (c), as both sides readily recognize. We will accept defendant's invitation to remand the case to the trial court to resentence him for count 11 under section 667.6, subdivision (c).

III

Housekeeping

Defendant contends, and the Attorney General agrees, that he is entitled to one additional day of custody credit. He was arrested on March 11, 2014, and sentenced on

March 26, 2015. Thus, as of March 26 defendant was entitled to 381 days of custody credit (365 + 16 = 381 days), or one more than the 380 days of custody credit awarded by the trial court. The court properly gave him 57 days of conduct credit. Consequently, the abstract of judgment must be amended to reflect 381 days of presentence custody credit, for a total of 438 days of credit.

The Attorney General also agrees with defendant that the amended abstract of judgment must be corrected further to reflect that defendant was convicted of violating section 288, subdivision (a) in counts 7 and 12, instead of section 288, subdivision (b)(1).

DISPOSITION

The case is remanded to the trial court for resentencing pursuant to section 667.6, subdivision (c) as to count 11. The court is further directed to correct the abstract of judgment to reflect (1) eight-year sentences on counts 1, 2, 8, 9, and 10; (2) a two-year sentence on count 4; (3) a total of 438 days of credit; and (4) convictions for violating section 288, subdivision (a) as to counts 7 and 12. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

HOCH, J.